2002

In Defense of "Old" Public Health: The Legal Framework for the Regulation of Public Health

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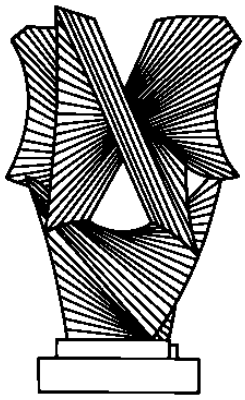
CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 170
(2D SERIES)



In Defense of the "Old" Public Health: The Legal Framework for the Regulation of Public Health

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ABSTRACT

The traditional forms of public health law were directly largely toward communicable disases and other externalities, such as pollution, with negative health impacts. The more modern view treats any health issue as one of public health so long as it effects large numbers of individuals, which would include such matters as obesity and diabetes. Historically, this paper examines the constitutional evolution of the public health principle from the narrower to the broader conception. It then argues that the narrower principle better defines the appropriate scope of coercive government intervention than the broader definition, which could easily authorize those forms of intervention in economic affairs whose indirect effects are likely to reduce overall social wealth and freedom, and with it the overall health levels of the population.

I. INTRODUCTION: OLD AND NEW PUBLIC HEALTH

Salus Populi Suprema Lex. "The well being of the public is the supreme law." That legal maxim does not represent some ringing endorsement of the welfare state in an age technological progress. Rather, that Latin maxim is as old as the law itself, with powerful roots (even) in the American political tradition.[1] Taken in isolation it represents the general proposition that individual liberty, especially on matters of public health, must be subordinated to the protection of the common good, so that the state is justified to use public force to achieve that

[1] William J. Novak, The People's Welfare: Law and Regulation in Nineteenth Century America (1996).

end. In many nations, this maxim has remained a matter of political prudence, where it functions as a guide to legislative and administrative decisionmaking. In the United States, however, the stakes have been surely raised in light of our constitutional structure, with its explicit protection to liberty and property against both state and federal regulation: "no person shall be deprived of life, liberty or property without due process of law"[2]—a command long read to have both substantive and procedural dimensions.[3]

On its face, this categorical provision does not allow for any regulation that trenches on liberty or property. Historically, however, the protection to liberty and property has never been read as a legal absolute. Rather, in light of the long-standing maxim, the protection of liberty and property as a constitutional matter has always been subject to an implied exception under the so-called police power. The grand question, in which the disputes over (public) health forms a part, is: how far does (or should) this elusive police power extend? On the modern view it reaches to any matter of general public interest or concern, including health in its broadest signification. The law makes little attempt to identify separate headings of the police power, such as public health, that operate as limited exceptions to the general presumption in favor of the protection of liberty and property. It makes even less attempt to identify any category of regulation that lies outside the police power. In contrast, the earlier period of our constitutional history—roughly speaking any time before 1937—did recognize an ample police power, whose extent has been documented in William Novak's book on "The People's Welfare."

To some, the broad use of the police power during the nineteenth century has been regarded as the decisive historical refutation of the laissez-faire of some

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2 See U.S. Const. Amend. 5 (binding the federal government) and Amend. 14 (binding on the states).

3 See, e.g., Chicago, Burlington & Quincy Ry Co. v Chicago, 166 U.S. 226 (1897).

golden period in which the American economy thrived in the absence of any and all forms of government regulation. In its place stood the view that the state limitations on private power were not instrumental assists to economic development, but the creation of "a special sphere of social activity, distinctively cognizable as an object of governance."[4] But no careful defender of laissez-faire has ever confused property and liberty with anarchy, and all have indeed recognized the case for some state regulation under the police power. Even though the classical writers on the subject, such as Ernst Freund,[5] were reluctant to offer any precise definition to the term, the received wisdom confined its application to laws and regulations that advanced the public safety, health, morals as well as the (catchall) general welfare.[6] It becomes therefore critical to develop some test which allows one to distinguish whether the nineteenth century cases conformed to or deviated from the laissez-faire vision of limited government, and if so where. No endless recitation of cases of the state regulation of nuisance answers that question, for these regulations are in principle consistent with both the broader and narrower conceptions of the police power. The acid test must be found elsewhere. Can one find the use of the police power to sustain any overtly anticompetitive or protectionist program, where the former speaks to a preference to competition in labor markets on the domestic front and the latter to open markets across state boundaries.[7] So-called

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4 See Novak, The People's Welfare, arguing that Id at 86. In his jacket blurb, Robert Gordon writes: [Novak] blasts to pieces the surprisingly hearty myth of laissez-faire, the libertarian fantasy that until the twentieth century the American state left private property and economic entrepreneurs alone."

5 See, e.g., Ernst Freund, The Police Power: Public Policy and Constitutional Right (1904).

6 See, e.g., Novak, at 13–17, quoting Lewis Hockheimer, Police Power, 44 Central L. J. 158 (1897): "The police power is the inherent plenary power of a State . . . to prescribe regulations to preserve and promote the public safety, health, and morals, and to prohibit all things hurtful to the comfort and welfare of society."

7 In making this analysis, recall that the foreign commerce clause was drafted with explicit protectionist impulses to present a unified front in negotiation with European powers. See The Federalist No 11 (Alexander Hamilton) 62-66 (Edward Meade Earle, ed. 1937 ed). But Hamilton also envisioned "an unrestrained intercourse between the States themselves of their respective

labor statutes, for example, which regulated the terms and conditions of employment contracts would be permissible under the broader definition of a well-regulated society, but, given that labor statutes were defined in opposite to health and safety statutes, such laws were struck down as outside the scope of the police power in the pre-1937 understanding of the subject.[8] The same was true for rate regulation in ordinary businesses that were not "affected by the public interest."[9] Novak's exhaustive compilation of the nineteenth century uses of the police power unduly stresses the admitted scope of the powers while ignoring the limitations on them.[10] At no point does he list even one regulation that goes against ordinary competition or in favor of protectionism. His selective vision is as important with respect to public health as with everything else. No one questions that public health and safety has long been regarded as a core and undisputed application of the police power. But what is needed is an explanation of how that power tied in with the more complex constitutional agenda of the time.

The purpose of this paper is to examine the shifting understandings of the public health head of the police power, as one moves from the traditional to the modern account of the topic. On both these matters, a veritable revolution has taken place over the past one-hundred years. My broad thesis is that the "old" version of the subject, which kept the "public" in public health, and stressed matters of communicable diseases and sanitation, is, for all its internal complexities, superior to the modern version that regards both the general field, and the constitutional power, to cover any and all matters that relate to the

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productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets." Id at 68.

8 See, e.g., Adair v. United States, 208 U.S. 161 (1908) (striking down a law that required mandatory collective bargaining on the railroads); Coppage v. Kansas, 236 U.S. 1 (1914) (same, for state statute).

9 On which, see infra at .

distribution of health care and health care services within the Country. In order to defend this thesis, Section II outlines the two rival accounts of public health, as it applies to both questions of individual rights and matters of federal and state power where they play an important, if underappreciated, role. Section III examines the parallel question of the use of the phrase public in the time-honored expression "affected with the public interest," which was once understood to be a restrictive condition on which (under the police power) it was possible to regulate the rates that private firms charged in the market place. The next two sections examine the parallel evolution of the term public in connection with public health. Section IV traces its use in connection with quarantine, vaccination and regulation under the morals head of the police power in the period before 1937 when, roughly speaking, the use of government power conformed to a classical liberal model. Section V then extends that analysis forward into the modern period, examining these same heads of liability. A short conclusion follows.

The central thesis of this paper is that the broad (and meddlesome) definitions of public health that are dominant will in all likelihood be conducive to the ill-health of the very individuals whom it seeks to protect. The new public health frustrates the very ends that it is intended to serve because it lacks focus and definition. It extends regulation into areas where it ought not to take place, and thus saps the resources and focus to deal with matters, here the spread of communicable diseases where regulation is appropriate. This use of communicable is not meant to be rigidly exclusive. I would certainly include for these purposes the release of pollutants which cause harms to others, including those which are responsible for various human diseases and inflictions. The key point here is to use a definition of public bads that tracks the idea of public goods

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[10] For a similar approach, see Lawrence O. Gostin, Public Health Law: Power, Duty, Restraint

in economics, namely, those nonexcludable goods that cannot be given to one unless they are also given to another.[11] The analogous concept for public bads are those which are inflicted on others without their consent, which is the case with both communicable diseases and pollution, but not with such matters as obesity or genetic diseases.

In dealing with the definition of public health, it is often tempting to adopt the position of "better safe than sorry," or it is "best to err on the side of safety." But this sword has a two edged-blade, for overregulation is not just a matter of dollars and cents, but brings in its wakes negative safety effects as well. The point has long been well understood in the area of risk regulation, where the "perils of prudence" lead towards the overregulation of remote risks under worse-case hypothesis. As Nichols and Zeckhauser argued some time ago, overregulation could leave us with more risk rather than less risk.[12]

Their target was the regrettable tendency to use unreliable but alarmist estimates in areas concededly subject to government regulation, such as cancer control But the point is not so limited, and covers any situation where regulation in the name of health (or safety) is invoked on erroneous grounds. Just that happens with the broad definition of public health. That definition justifies interference with contractual arrangements (e.g. for the provisions of vaccines) that could save lives while undercutting the control of communicable diseases such as AIDS. We do very well today in the United States because our advances in knowledge and technology have in large measure dominated the mistakes in institutional design. But we can do better, and will do better only if we return to the narrower definition of public health.

47–51 (2000),.

11 See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965), for the classical account.

12 Albert L. Nichols and Richard J. Zeckhauser, The Perils of Prudence: How Conservative Risk Assessments Distort Risk Regulation, Regulation 13 (Nov. Dec. 1986).

II. TWO RIVAL CONCEPTIONS OF PUBLIC HEALTH

The exact limits of that power have been subject to extensive litigation, but public health has always rested at its core. In upholding a compulsory vaccination law against smallpox, Justice Harlan put the matter this way in Jacobson v. Massachusetts[13]—a case to which we shall return at length:

> Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations, established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden,* [22 U.S. 1 (1824)]."[14]

Harlan's formulation covers two distinct features that play essential roles in American constitutional history. One theme, of secondary importance in this context, articulates the division of authority between the state and national governments in public health regulation. Harlan's citation to *Gibbons v. Ogden* brings home the point because it was at the time the leading decision on the scope of Congress's power under the commerce clause—"Congress shall have the power . . . to regulate commerce with foreign nations, among the several

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13 197 U.S. 11 (1905).

14 Id. at 25. The references to jurisdiction may be of little concern to nonlawyers, but they are an essential part of the overall story of health care regulation in the United States. The case authority cited by Justice Harlan immediately after the quotation was Gibbons v. Ogden, 22 U.S. 1 (1824) which was concerned with the delineation of the power of Congress "to regulate commerce . . . among the several states. . . "

states and with the Indian tribes."[15] The second, which is our primary focus, addresses how far government at either level may regulate on behalf of the public health.[16] The matter was one of some difficulty because, broad as the police power was, it was not, at least 100 years ago, an open sesame that legitimated any and all uses of government power that invoked the phrase "public health or public safety."

On the jurisdictional question, the limitations on federal power alluded to in Jacobson have largely been consigned to the dust-bin of history.[17] The traditional effort to demarcate exclusive spheres of state and federal regulation have fallen before an expansive interpretation of commerce. In the hands of Chief Justice Marshall, the term commerce received what he regarded as a broad and not technical definition. It covered transportation and trade that crossed state boundaries. It excluded therefore all commerce and trade that took place solely within the confines of one state, and, more importantly, all manufacture and agriculture, which were regarded as "local" concerns outside the scope of the federal government.[18] The distribution of powers left the national government without a general police power to deal with these internal matters. Its power over public health therefore had to be derived from other (nontrivial) powers conferred on it by the Constitution. The power to raise and maintain armed forces necessarily gave the national government an important say on public

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15 U.S. Const., Art. I, § 8, cl. 3. For my detailed analysis of this provision, see, Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387 (1987).

16 See, Gibbons, at 205–6 (noting that state quarantine laws were consistent with the commerce power); see, for a more emphatic statement of the same point, License Cases, U.S. (5 How.) 504, 580–81 (1847).

17 I ignore for these purposes the recent decisions of the Supreme Court that have struck down some federal enactments as falling outside the scope of the commerce clause. See, e.g., United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

18 For just one indication that this was the clear understanding of commerce, see The Federalist No. 17 (Alexander Hamilton): "

health issues in military contexts.[19] Its powers over immigration allowed it to set and implement policies that determined which individuals should be admitted to the United States and which excluded—on which issues of public health played a great role. Finally, its power over transportation and navigation gave it some limited power over public health matters. But when all is said and done, under the basic constitutional design in place during the formative period of public health regulation in the United States, the brunt of the work fell on the states. That point was explicitly acknowledged by Chief Justice Marshall in *Gibbons* when he noted that quarantine and inspection laws (designed in part as health measures) fell exclusively within the power of the states at the beginning or conclusion of the journey.[20]

The most contentious question in the earlier period, however, did not involve the allocation of power within the federal system, but claims that individuals had to deal resist regulation by government at either level. At this point, the matter of public health gives rise to the well-known tension between individual liberty and the common good. Justice Harlan stated this point forcibly as well:

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder

[19] See, e.g., An Act Relative To Quarantine, 1 Stat. c. 12, (p.?) 619 (1799); 1 Stat. ch. 31, p. (?) 474, which sought to coordinate the execution of the federal power with applicable state laws, acknowledged as proper under the police power. See, Novak, at 210.

> and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual to use his own, whether in respect to his person or his property, regardless of the injury that may be done to others.[21]

The central question, therefore, is to explicate the relationship between individual liberty ("real" or otherwise) and the common good as it applies to the matter of public health, including the narrow issue raised in *Jacobson* proper—when is it appropriate to impose a compulsory vaccination requirement. That issue cannot be considered in isolation because that same tension between individual liberty and the common good arose in a wide range of context during this same period of constitutional history—roughly the years between the end of the Civil War and the constitutional crisis of 1937. In dealing with this issue, two questions must be addressed. The first of these concerns the proper account for public health or indeed any other form of public good, i.e. those concerns that trigger the application of the police power. The second is the means-ends question of whether, with the proper end established—say the control of contagion—the means in question were properly chosen for the end in view.

On both these issues we can see a powerful transformation from a more to a less restrictive view. On the question of public health or common good, the original definition—not perfectly, but by and large—was confined to those goods, or bads, that raised serious issues of market failure: that is, to situations where competitive markets based on strong individual rights of private property could not be relied on to achieve anything close to the social optimum. The rival view, which gained over this period, simply invokes the idea of the common good (or the public interest) to allow state regulation on any matter of business or social life that affects a substantial fraction of the community, where the

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[20] Gibbons, 22 U.S. at 203, 205–6.

allocative outcomes of the competitive marketplace no longer supply a normative baseline against which the efficacy and validity of state regulation is measured. There is an enormous gulf between these two points of view, both on matters of general regulation and public health. On the former, it allows the broader view allows for extensive regulation of competitive markets that the narrower view limits. On the latter, public health ceases to be concerned only with questions of sanitation and communicable diseases, and becomes a vast catchall that justifies any government effort to improve the health and overall quality of life of its citizens.[22] Here it is best to use the language of its defenders to state what this conception requires:

> The broad pole of public health defines a very wide scope of organized activities, concerned not only with the provision of all types of health services, preventive and therapeutic, but also with the many other components relevant to the operation of a national health system. These involve questions of health behavior and the environment as well as the production of resources (personnel and facilities), the organization of programs, the development of economic support, and the many strategies required to ensure equity and quality in the distribution of health services.[23]

In similar fashion, Lawrence Gostin quite consciously entwines old functions (which are, rightly, never abandoned, with new ones in his account of the scope of public health.

> The mission of public health is broad, encompassing systematic efforts to promote physical and mental health and to prevent disease, injury and disability. The core functions of public

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[21] Jacobson, at 28.

[22] Theodore H. Tulchinsky & Elena A. Varavikova, The New Public Health: An Introduction for the 21st Century xix (2000)

> health agencies are to prevent epidemics, protect against environmental, hazards, promote healthy behaviors, respond to disasters and assist communities in recovery, and assure the quality and accessibility of health care services.[24]

In essence the new definition sees public health as all measures to protect individual or collective health that are not involved with the treatment of given individuals within a medical setting. It includes dealing directly with risks of communicable disease, and, of course pollution, but only to the extent that these are directly linked to particular pathogens or substances. It may well be that some overall improvement in the income or wealth of society will improve public health, but these general improvements, of which there have been many, are no more closely linked to public health issues than they are to a thousand other measures of individual happiness and satisfaction. As Mark Hall has emphasized, are goals that are worthy of achieving, but not public health goals as such.[25] The sections that follow are intended both to explicate and defend the old definition of public health against its new competitor.

III. BUSINESSES "AFFECTED WITH THE PUBLIC INTEREST: 1865–1937

Let us return to the Justice Harlan's formulation of the police power in Jacobson. Recall that he did not speak of the ability of the state to regulate for matters of health generally, but confined its powers to the regulation of public health. Was word "public" simply window-dressing, so that all matters of health (public or private, as it were) became proper objects for government regulation, or did that term identified a limited and proper sphere of government regulation? The choice between rival conceptions did not take place in a vacuum, but against an extensive legal tradition governing the relationship between

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23 Id at xix.

24 Gostin, Public Health Law, at 16.

private rights and the common good. In its earliest manifestation, the question was whether certain forms of property were to be regarded as private or common. As early as Justinian, "natural reason" demanded that certain forms of property not be reduced to private ownership.[26] These included, most prominently, the air and the water, with the beach as the marginal case. On the private side of the line lay most land, ordinary movables, and wild animals whether on land sea, or air. All of these were unowned in the state of nature, but could be reduced to private ownership by occupation, in the case of land, by taking, in the case of chattels, and, by capture in the case of wild animals.

The initial set of rules for common property were relatively simple because the sole function of the state was to prevent anyone from excluding others.[27] The situation became, however, more complicated when investment in infrastructure needed to widen a waterway or to build a bridge. No longer would rules of open access suffice. Someone had to provide the needed capital and management. At this point the state had only two options for financing this so-called public good—that is a good which has to be supplied to all if it is supplied to even one.[28] The state could tax and spend, or it could grant an exclusive franchise to private firm prepared to make the needed investment. An enormous historical debate quickly arose as how best to fund and construct these public goods: that is those goods, which when provided to one had to provided to all.

The matter is neatly illustrated by the history of lighthouses, often described as a pure public good because its beacon provided benefits for all

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25 Mark A. Hall, The Scope and Limits of Public Health Law (mss).

26 See, e.g., Justinian, Institutes, Book II, Title I, pr.

27 Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 254–56 (1998).

28 See, for the classic account, Mancur Olson, The Logic of Collective Action (1965).

users.[29] Before the 1830's these lighthouses were privately owned and operated. They collected their fees from landed vessels by relying on British customs office with its coercive power over ships. Yet that semi-private system did not last, but was replaced by one that financed lighthouses out of public resources. Why the shift? In part the answer depends on which deviation from pure market institutions creates the fewer distortions. The private lighthouses probably were able to extract a monopoly rent for their services, which reduced the level of trade. The taxation could contain that risk so long as the political process limits the amount of the tax collected to the cost of the service provided. But public administration can easily introduce administrative inefficiencies of its own. It is an empirical question whether the newer system outperformed the older one.

This same painful choice between monopoly power and taxation arose with other forms of improvements. Typically it was possible to widen the channel on a single river, or build a single bridge over the river. Once the state chose not to construct the improvement itself, then allowing the franchisee to charge, quite literally, what the traffic would bear opens the public to the risk of monopoly exploitation.[30] The task is then to figure out how to limit the return on investment without confiscating the initial investment. Here is not the place to discuss the full range of techniques used to accomplish.[31] But it is critical to note that first the English, and then the American law, spoke of these monopolies as businesses "affected with the public interest." Sir Matthew Hale[32] used this phrase in the 17th century to explain why the rates charged for individuals who operated a public wharf—that is one to which all must come to load and

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[29] See Ronald Coase, JLE . Coase stressed the ability of private markets to fund public goods, but downplayed the use of public power to collect the needed revenues. See also van Zandt, JLE,

[30] For a more detailed discussion, see Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 278-318 (1998).

[31] For a discussion, see Herbert Hovenkamp, Enterprise and American Law: 1836-1937 (1991); for a judicial assessment of rate-making, see Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

unload—could not charge whatever rates they choose, but must charge rates that were only "reasonable and moderate." Hale supplied the decisive argument in Alnutt v. Inglis[33] where the state monopoly was a licensed customs house for goods bound for export free of local custom duties. Lord Ellenborough held that the licensee's monopoly power justified limitations on rates.

> There is no doubt that the general principle is favored in both law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of the monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.[34]

The principle articulated in this case was carried over to the United States in Munn v. Illinois,[35] which rejected a constitutional challenge to the maximum rates that Illinois set for grain elevators that operated along-side the railroad tracks on the grounds that they were "affected with the public interest." Justice Waite quoted extensively from both Hale and Alnutt[36], including Hale's reference to legal monopoly. Chief Justice Waite alluded to some agreement among the grain operators, but stopped short of calling this "virtual monopoly" a cartel, only to conclude that any remedy for the operators lay at the polls and not with the court.[37] Justice Field, a consistent libertarian, issued a stinging dissent to the effect that if grain elevators were affected with the public interest,

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32 Matthew Hale, De Portibus Mari (Concerning the Gates to the Sea), published posthumously in the 1780s.
33 12 East 525, 104 Eng. Rep. 206 (K.B. 1810).
34 Id. at 538, 104 Eng. Rep. 210 (?)–11,
35 94 U.S. 113 (1876).
36 94 U.S. at 125–28.
37 Id at 131,

then so was every other business.[38] But all the while he remained eerily quiet on the issue of monopoly lurking in the background.

The following 50 years produced a confused array of decisions of when prices or rates could be regulated for firms affected with the public interest, subject to a constraint against confiscation. Public utilities were always in the mix because of their monopoly power.[39] Eventually the entire edifice crumbled, as the Supreme Court slowly separated the test of "affected with the public interest" from the existence of legal (or natural) monopolies. Here it is sufficient to mention two landmarks along the way. First, German Alliance Insurance Co. v. Kansas[40] sustained rate regulation in the competitive fire insurance industry, without so much of a hint of industry-wide collusion. A generation later, Nebbia v. New York[41] rejected the tests altogether by upholding New York's minimum prices for milk on the ground that the diary industry, like every major business, was affected with the public interest.[42] Nebbia transformed a concept initially designed to limit monopoly power into one that propped up state-sponsored cartels, in part on the dubious public health ground that higher costs offered protection against contamination and spoilage.[43] Nebbia led to an increase in

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38 94 U.S. at . "There is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; . . ."

39 See Walton Hamilton, Affectation with the Public Interest, 39 Yale L. J. 1089 (1930).

40 233 U.S. 389 (1914). "Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it . . ." Id. at 413.

41 291 U.S. 502 (1934).

42 Nebbia at 531–32: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.

43 Nebbia, at 516.

price and a reduction in supply of milk, with serious negative health consequences.

Yet the Supreme Court had not wholly lost its ability to differentiate between competition and monopoly. One year after Nebbia sustained New York's price fixing scheme for New York farmers, Baldwin v. G.A.F. Seelig, Inc.[44] used federalism principles to strike down New York's differential tax on out-of-state milk, which was intended to eliminate the entire price advantage enjoyed by out of state suppliers. The Congress of the United States may impose or authorize (misguided) nationwide cartels with impunity because represents national, not parochial state interests.[45] But when Congress is silent free trade is the norm. Under this new logic, private cartels are vigorously punished under the antitrust laws, but state-sponsored cartels are insulated from the antitrust laws,[46] even though their greater durability makes them more dangerous to the public at large. The point here is that we can stick the original view of Alnutt that rate regulation is the quid pro quo for monopoly power. We do far worse in rate regulation with the broad conception of the public interest than we do with the narrower one.

IV. PUBLIC HEALTH REGULATION: 1865–1937

Why Regulate Here? The public health regulation has been subject to a similar conceptual revolution over this same time, only now the key danger that triggers regulation is communicable disease, not monopoly. The early public health initiatives were tied closely to the control of communicable diseases, i.e.

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44 See 294 U.S. 511 (1935). For a modern variation, see West Lynn Creamery v. Healy, 512 U.S. 186 (1994), where the Supreme Court invalidated a uniform Massachusetts tax on all milk sold within the state regardless of whether it was produced locally or out of state, because tax rebates were only to Massachusetts dairy farmers.

45 See, e.g., Wickard v. Fillburn, 317 U.S. 111 (1942).

46 Parker v. Brown, 317 U.S. 341 (1943), decided the same term as Wickard.

epidemics. Why regulation here, and not with the "epidemics" of the new public health law, such as obesity and diabetes.

The simplest way to approach this question is to ask whether or not a system of private rights under a laissez-faire theory could deal with the contagion issue.[47] The key building blocks of that system are the exclusive right that all persons have in their own body and property; the dominance of voluntary contract as the means to alter those initial entitlements; and the use of tort remedies to protect against harms that one person inflicts against another. How might such a system treat the risk of communicable? The only weapons in its arsenal are to allow one person to sue a second for damages for harms that have occurred, or to seek injunctive relief against threatened harms. Both these private remedies are, to put it mildly, inadequate to meet the challenge at hand.

Start with the question of whether one person could sue another for the death or injury attributable to communicable disease. These illnesses stand in stark contrast to the ordinary traumatic or sudden injury that has (typically) one easily identifiable cause. It is even debatable whether communicable diseases are attributable to the actions of any individual. Quite often, disease quickly spreads from one person to the next, without any human action (save sneezes) at all. Once infections spreads, it becomes quite impossible to determine which person or persons was responsible for each case of disease, even today when we possess a solid knowledge of the mechanism of disease transmission. These fact questions were quite beyond the power of any legal system to resolve by piecemeal litigation 300 or even 100 years ago. Even if by some miracle one could finger the wrongdoer, what is to be done if he has perished from the plague? Injunctions are every bit as bizarre. No longer does one landowner seeks to

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[47] For the more general statement of my views, see Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979); Richard A. Epstein,

enjoin a flow of stench from a neighbor's well. Here, quite literally, tens of thousands of people are both potential plaintiffs and defendants: just who should sue whom, and for what? Either way then public intervention makes sense. If the plague is an act of God, then no one is liable. If attributable to one person, no one could track them down. Either way, some (but not all) forms of direct regulation holds out the possibility of increasing security for all at the expense of liberty. So long as each regards himself as the gainer from this massive social exchange, who should protest about it in the abstract.

The massive breakdown in both the theory and practice of private rights makes public remedies instantly attractive even to people who have not gone through any formal drill. In the easiest cases, moreover, these public health remedies will not conflict with any conception of individual rights. Thus it is hard to conjure up any civil liberties objections to one of the great public health triumphs of the nineteenth century, when John Snow discovered that the source of cholera lay in the contaminated waters pumped from the Thames below London's Broad Street station. Moving the water pipes upriver the pollution is the kind of sensible self-help measure that only a madman would protest.[48] The near 90 percent reduction in deaths (from 317 per 10,000 homes to 37 per 10,000 homes) supplies the only cost/benefit analysis any one needs. Likewise only a knave would protest in principle the use of public funds, raised by taxes, to support a system of public drainage and sewers, including the London rivers and the waterworks involved in Snow's cholera case. The conflict between public health and individual lies elsewhere, most notably with quarantine and related sanctions, such as the destruction of infected animals and goods, and with vaccination statutes. Each area needs more specific discussion.

Takings: Private Property and the Power of Eminent Domain, chs 8 and 9 (1985) (analysis of the police power).

[48] See Tulchinsky & Varavikova, at 25-27, for a brief account of the episode.

Quarantines and Related Sanctions. No one doubts that quarantine was a standard health protection measure in the nineteenth century, and before. Quarantine measures were common in the American colonies before independence.[49] The practice of quarantine is, in a sense, almost as old a disease itself. As early as 1710, the English adopted a generalized quarantine statute in response to the entrance of diseased individuals from the Baltic into England.[50] The ship represented a discrete unit that could be kept from port until it was determined administratively all the individuals on it were free from disease. To put teeth in the statute, persons who boarded that ship "may be compelled and in the case of Resistance may by Force and Violence, be compelled" to return and remain on the vessel until the risk had passed, at the expense of the shipowner, not the Crown.[51]

The narrow focus on quarantine helped design the highly sophisticated public health systems that were used during the massive immigration to the United States and Canada during the late nineteenth and early twentieth century. Then (but not now) one was prepared to keep out immigrants on the ground that they supplied cheap labor in competition with domestic workers. But they were prepared to keep them out if they suffered from some contagious disease. The system therefore called for medical inspections at the docks. Those people found infected were not sent home straight-away but were sent to Ellis Island where they were given a fair chance to recuperate. If sent home it was, as in the English case, at the expense of the carrier, which then had an incentive to only board individuals free of infection at the other end. Pier 21 in Halifax, Canada operated

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49 See, e.g., Elizabeth C. Tandy, "Local Quarantine and Inoculation for Small pox in the American Colonies, 1620-1775, 13 Am. J. of Public Health 204 (1923).

50 9 Anne, c.2 "An Act to oblige Ships coming from Places infected more effectually to perform their Quarentine."

51 Id. section IV.

on a similar system. That system did a fine job in reconciling individual liberty and public health. It was the lifeline of millions, including my grandparents.

The use of quarantine is especially important when the fact of infection and contagion is known, but little can be done to fight it on a piece meal basis. Thus, as a thought experiment, no one would (or should) favor quarantine with respect to a communicable disease for which all individuals had perfect individual defensive remedies. Indeed in these cases, the disease would be eradicated, or at least contained, in a short time in any event. But recall that only in the second half of the nineteenth-century that bacteria were understood to be a causal agent for the spread of disease. In that uncertain environment, overbreadth in the choice of remedy is preferable to underbreadth, from which entire communities (and their individual liberties could perish).

Within the framework of American constitutionalism, quarantine necessarily interfered with the ordinary liberty to travel, but the gains to public health (i.e. the safety of countless others) so outweighed the losses that it was impossible to mount a principled categorical attack against this form of regulation. Behind a veil of ignorance, everyone would opt for quarantine when no lesser remedy could do the job. The basic laissez-faire account of the police power holds: everyone is a net gainer from behind the veil of ignorance of the uniform application of quarantine rules. So understood, this view of the police power was seamlessly incorporated, as Novak has noted, into the American law dealing with the subject.[52] The Supreme Court wrote in Railroad Co. v. Husen, that "we unhesitatingly admit" that the power covers against the prohibition against entrance of people, animals, and goods that carried with it the danger of transmitting any contagious or infectious disease.[53] That power to exclude

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52 See, e.g. Novak, at 204-213

53 95 U.S. 465, 472 (1877).

carried with it the power to admit subject to regulation and conditions, such as the use of reasonable inspection laws.

The devil, however, lies in the details. The part of the story that Novak did not develop are those cases where (purported) quarantines under the police power fell before constitutional provisions that dealt with jurisdictional and individual rights. Once again the narrow focus on public health sharply delineates the issues. In Husen, an 1872 Missouri law prohibited driving or conveying Texas, Mexican, and Indian cattle within the state between March 1 and November 1 of any year. The law also allowed cattle to be transported, unloaded, by railroad or steamboat, only if the owners thereof stood liable for any disease that the cattle might cause, and, it set up the presumption that cattle infection along the route was the cause of that disease. Notwithstanding the general recognition that the state police power embraced quarantines, this particular regulation was struck down as an invasion of Congress's exclusive right to regulate commerce among the several states because the state measure went "beyond what was absolutely necessary for its self-protection.[54] (Note the absence of any broad communitarian sentiment.) The Court held that the statute disrupted the national market by blocking transportation across state lines.

Husen's effort to see the right balance was tough, for note the arguments on the other side. A statute intended at trade restriction would not have targeted only areas in which cattle suffered from Spanish or Texas fever. The real question therefore is whether some lesser means could have detected the disease. Here the statute exempted cattle that had wintered within the state, presumably because they had time to show signs of disease. The big hole in the record was whether any border inspection could have detected infected cattle at reasonable cost, and, if so, with what reliability. Perhaps a fuller record could have explained why the

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[54] Id at 472.

eight-month ban was necessary, but for these purposes, the merits of the decision are less important that the frame of mind brought to the matter. Although the police power was broad, it was by no means unlimited. Quite the opposite its use was hemmed in by rival considerations, most notably the maintenance of an open and competitive market.

That same narrow focus strikes down quarantine laws that subjected discrete minorities to state-sponsored discrimination. In Jew Ho v. Williamson[55] the purported quarantine applied only to the Chinese quarter of San Francisco. Unlike the strictures in the 1710 Quarentine Act, Anglos were permitted to go in and out of the quarantined district at will, while the local Chinese, who had borne the brunt of many a discriminatory law,[56] were required to stay put. The older always asked whether the means chosen fit the narrow constitutional end, which here they manifestly did not. The Court thus struck down this quarantine as a sham that fell outside the scope of the police power.[57]

The point can be generalized. So long as the ideals of liberty or competition are taken seriously, then the hard question under the police power is to deal with cases of mixed motives. In arguably the most famous case of the 1865-1937 period, Lochner v. New York[58],the Supreme Court by a bare five to four majority struck down a statute that limited the maximum work hours for employees (but not owners) in some (but not all) types of bakery as an illicit "labor" statute that it held not to be a public health measure, even though a few years before the Supreme Court had upheld a maximum hours statute for coal miners.[59] Lochner decision was marked by two dissents with very different

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55 103 F.10 (C.C.N.D. Cal. 1900).

56 See, e.g. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory rules for laundry permits).

57 See, Jew Ho, 100 Fed. at . Note that Novak mentions the Chinatown quarantine but does not discuss Jew Ho's invalidation of it. Novak, The People's Welfare, 215 & 336, note 102. Gostin approves of the outcome, Gostin, Public Health Law, at 213.

58 198 U.S. 45 (1905)

59 Holden v. Hardy, 169 U.S. 366 (1898).

implications. Justice Harlan's ponderous opinion argued that New York's health justifications were bona fide. Justice Holmes's classic, pithy dissent attacked the idea of liberty of contract itself, as the revival of Mr. Herbert Spencer's Social Statics. The difference is palpable. Once the issue was a straight labor regulation—i.e. whether employers could be forced to bargain with employee unions, Harlan switched sides and struck the law down as a labor statute,[60] while Holmes dissented on the ground that the conception liberty of contract did not prevent the state for equalizing bargaining power between the parties[61]—a conception that laissez-faire rejections without hesitation. Today's embrace of the broader government role rejects the view that liberty of contract protects individual choice in competitive labor markets, so the Lochner jurisprudence quickly collapsed.[62] The historical opposition between public health and labor statutes was no more.

At the same time, however, the appeal of competitive federalism in the absence of Congressional command has kept the distinction (between protectionist legislation and health laws) robust and well in interstate matters. Thus it was appropriate on public health grounds to keep out-of-state baitfish Maine waters only because of the genuine uncertainty whether these fish carried parasites that might prove harmful to native species.[63] In contrast the simple invocation of the language of quarantine was not sufficient to allow one state to keep waste from another state out of its jurisdiction.[64] Note too that the protectionist peril makes it imperative to keep this inquiry alive, which is why the standard free trade agreements under the WTO limit the scope of the health exemption to the free trade rule.

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60 Adair v. United States, 208 U.S. 1 (1908).
61 Id at .
62 See, e.g.
63 Maine v. Taylor, 477 U.S. 131 (1986)

As with the regrettable validation of minimum price levels for dairy products, all these cases have public health interests on both sides of the line. A system of strong protectionism with dairy products increases the costs of these goods and thus would via regulation the health of the citizens who are adversely impacted. We cannot use any appeal to public health to worry simply about one type of error (letting in harmful goods) while ignoring the second of error (keeping out healthful goods). Fortunately, the Supreme Court has reacted with appropriate skepticism at local efforts to keep out milk, for example, that has not been pasteurized in local facilities, so long as it has been appropriately treated at its point of origin.[65] Once again the federalism rules keep to a conception that should apply to individual rights as well.

Vaccination. Quarantine is only one public health measure. Vaccination is second, which requires somewhat greater medical sophistication. Here the practice began with Edward Jenner's discovery in 1796 that exposure to the mild cow pox rendered people immune to small pox.[66] For most people at the time, the only real question was how to gain access to a vaccine that provided strong protection against a deadly killer, so that the issue of compulsion lay far in the background. But not in all cases. Recall that the extensive discussion of the police power 100 years later in Jacobson arose because one individual at least challenged the power of the state to expose him to the small pox vaccine. Jacobson's challenge, moreover, should not be dismissed as fanciful: he claimed that in light of his family history and his severe reaction to a prior vaccination, that it was unwise for him to submit to a second treatment.[67] His lawyer also introduced statistical evidence that indicated that the incidence of small pox was

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64 Philadelphia v. New Jersey, 437 U.S. 617 (1978), relying explicitly on the pro-competitive language found in Baldwin v. Seelig. .

65 Dean Milk v. City of Madison, 340 U.S. 349 (1950).

66 See Tulchinsky & Varavikova, at 19–20.

67 See Jacobson, 197 U.S. at .

no higher in those state without compulsory vaccination than it was in those states with it—doubtless because of a high level of voluntary compliance. He thus objected to a categorical order of the Cambridge Board of Health which ordered vaccination or revaccination (for those who had not been vaccinated after March 1, 1897) of all adults living in the town. The penalty for noncompliance with $5.00.

In response, Justice Harlan did not defend the efficacy of compulsory vaccination laws as should, but held that it should defer to the legislature which "is the only body which has the power to determine whether the anti-vaccinationists or the majority of the medical profession are in the right."[68] And it was on just this ground—that courts cannot consider individuated evidence—that the Court sustained the program. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Harlan then duly noted the state could quarantine entrants into the United States who might ultimately prove to be free of all disease.[69] But the analogy is flawed. Harlan's case involves the ex ante uncertainty whether a person does or does not have a contagious disease. To make it explicit, assume that the condition is one against which other individuals have no known means of self-defense. At this point, the correct judgment in the face of uncertainty is to force all individuals to suffer the lesser peril of quarantine so as to spare others the probability of death.

Vaccination was not detention or isolation. Assume for the moment that Jacobson could have demonstrated that he, alone of all residents, was likely to die from the vaccine, but that the local authorities simply refused to introduce any exception into the program. Is that sacrifice still required? Suppose, further,

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[68] Id. at . Deference is today the issue under modern administrative law. See Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

[69] Id. at S.Ct. 358

that the all other individuals could obtain absolute immunity from small pox by taking the vaccine themselves. At this point, the scales seem to tip strongly in the opposite direction, for the availability of individual self-help measures undercuts the need to use compulsory vaccination for self-defense or public necessity. (Indeed it would do the same to quarantine.) Far from controlling contagion, this statute now smacks of unwise paternalism that ignores all the private information that Jacobson, quite sensibly, regarded as relevant to his choice. On this model, the statute that does not substitute a measure of security more valuable than the liberty surrendered. The traditional police power logic falters when effective self-help removes the public (i.e. communicable) risk from the equation.

But what if the small pox vaccine has partial, but not total effectiveness? Now the calculations shift back because self-help measures cannot cut the risk of infection to zero. Just think of a simple model in which vaccination reduces the risk for all (normal) individuals by 50 percent, without any ill side effects. If the likelihood of getting the disease depends on the number of other exposed individuals elsewhere in the community, then compulsory vaccination looks like a justifiable counter to the classical prisoner's dilemma game where each person stands aloof counting on others to take the vaccine. That coercion could be more critical when vaccination carries with it some small risk, say 1 percent, of harmful consequences. In this case, the uniform rule might well make all individuals better off with universal coverage than they would be with no coverage at all. Yet even here the calculations must be more nuanced. If one could say with certainty that the disease could not spread even if five percent of the population were not vaccinated, should a lottery system be used to exempt some? Should those of special risks be given preferred exemptions? Should people be allowed to bid for exemptions?

The early cases do not deal with any of these complications, but for small pox it appears as though the vaccine had less than perfect effectiveness. Justice Harlan quotes statistics from the 1870–71 epidemic in Chemitz where the incidence of small pox is far lower among the vaccinated population than it is among the nonvaccinated population.[70] Yet these numbers could be questioned: some vaccinated people could have been previously exposed to the disease, for example. But even so, the interdependence of fortunes between those who were vaccinated, and those who were not, seems clear enough. If more unvaccinated individuals had received the vaccine, the mortality rate in the vaccinated population would have declined. Yet even this proposition does not justify compulsory vaccination until it is known why the substantial minority of the population was left unvaccinated. One possibility is their own ignorance, with the fatal consequences that it carried. But yet another is that there were insufficient supplies of the vaccine to go around. If so, then perhaps state compulsion should be redirected to taxpayers who should be required to fund vaccination for the vaccine to the poorest segments of the population, both for their protection and its own. If, it turns out, that ignorance has led people to refuse injections that could save their lives, then it is tempting to endorse a dollop of paternalism, for individuals killed by infection cannot learn from their mistakes, even if others might.

Nor do these larger statistics do not necessarily deal with Jacobson's case, for his claim is that he is better off without the vaccine than he is with it, for in the former case he is certain to be subject to serious disabilities, which in the latter case are only possible. But note the final twist: he escaped his unwanted

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[70] "At this time in the town there were 64,255 inhabitants, of whom 53, 891 or 83.97 percent., were vaccinated, 5712, or 8.89 percent, were unvaccinated, and 4,652, or 7.24 percent., had the small pox before. Of those vaccinated, 953, or 1.77 percent became affected with smallpox, and of the uninocculated 2,643, or 46.3 percent. had the disease. In the vaccinated the mortality fro the disease was 0.73 percent, and in the unprotected it was 9.16 percent.

fate by paying a $5.00 fine, which places the term "compulsory" in quotation marks. It is not as though Jacobson had been vaccinated against his will.

So just how strong is the case for compulsory vaccination? Most obviously, sham vaccination programs, like sham quarantines, did not come within the police power. In the companion case to Jew Ho, Wong Wai v Williamson,[71] the applicable public health ordinance required vaccination of Chinese against the bubonic plague before leaving the city. Once again the ordinance was struck down because it did not apply to the full population. Other situations were of course more complex. In Zucht v. King,[72] the Supreme Court unanimously sustained against constitutional challenge a statute that required all children be vaccinated before being allowed to attend either public or private school—which is a lot steeper than a $5.00 fine. For procedural reasons, Justice Brandeis's decision only addressed the facial validity of the statute. It did not consider any challenges based on the invidious administration of the statute. It just treated Jacobson as dispositive, notwithstanding the raised stakes. But should the state be able to require vaccination in the absence of any particular threat of a given disease? What kinds of individuating conditions could defeat the application of the statute? Why should the state has the power to ban children from attending private schools, capable of setting their own admissions rules, when the risk of infection or contagion is at least as great at beaches, movie theaters and shopping malls? We should be more uneasy about the use of these programs than we perhaps we were when Zucht itself was decided.

Morals. In order to complete the picture of the pre-1937 law on public health, it is necessary to address briefly on the "morals" head the police power[73]

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71 103 F. 1 (C.C.N.D. Cal. 1900)

72 260 U.S. 174 (1922).

73 For its inclusion, see Hockheimer, supra note 6;

that covers areas which count as, broadly speaking, "sinful."[74] Thus the standard protection given to freedom of action and voluntary exchange did not carry over to such activities as gambling, idleness, and animal abuse. Nor did they protect much sexual conduct outside of marriage, including prostitution, fornication, adultery, homosexuality, sodomy, bestiality, bigamy, polygamy and incest.[75] The laws in question not only targeted individual practices, but it also shut down as public nuisances the saloons and bawdy houses used to organize these activities, and thereby decreased their frequency.[76]

As applied to sexual conduct outside of marriage, these rules were motivated in part by concerns with health and safety, but in equal, if not greater measure, by religious denunciations of these practices, independent of their public health consequences. So understood, much morals regulation seems almost bizarre today: idleness was a form of immorality that justified shutting down of a bowling alley.[77] Lotteries were (and are) terrible, unless operated by the state.[78] But whatever the odd motivation, egregious overbreadth and unruly composition of morals cases, one side consequence of their enforcement was to reduce sexually transmitted disease even in the absence of specific knowledge of the mechanism of its transmission. The morals head of the police power thus served as a useful backstop to health and safety in the response to communicable diseases.

By now the bottom line should be clear: the legal system had ample means to protect public health from communicable diseases and sanitation hazards. Yet at the same time it took steps to insure that public health regulation did introduce economic protectionism or the regulation of labor markets—the two

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74 For an extensive discussion, see Novak, The People's Welfare, at 149–89.
75 Id at 153.
76 Id.
77 State v. Haines, 30 Me. 65 (1849)

central foci of the pre-1937 protections of liberty and property. On balance, with quibbles here and there, I think that this old balance on public health was the correct one even if one does not presume, as does Novak, the special relationship between the governors and the governor. The key point here is that the rules which limited state regulation were as important for the advancement of public health as those which authorized state regulation. I leave it for others to decide whether this "old" system of public health should, or should not, be described as a laissez-faire system. The more important point is that both sets of choices made good social sense.

V. THE MODERN PERIOD

But what of the modern alternative? The parallels to the evolution of "businesses affected with the public interest," are quite close, for in both areas the idea of public is unmoored from the economic conception of a (nonexcludable) public good so as to embrace any topic of widespread public importance. That broader definition in turns opens the field to increased regulation, such as mandated minimum prices in the dairy industry that leads to a reduction in public health by raising the price of needed dairy products. Paradoxically the expanded scope of economic regulation over wages and prices post 1937 has been matched a contracted police power over health and morals in the face of renewed claims of privacy, religion and intimate sexual conduct. To see how this pattern develops, it is useful to go over the three areas discussed in the last section, quarantine and related sanctions vaccinations and their public morals.

Quarantine and similar sanctions. Quarantines proper have not used in recent years because of our general success in controlling the contagious (e.g.

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[78] Stone v. Mississippi, 101 U.S. 814 (1880). (in alienable nature of state police power allows it to terminate private lotteries granted state charters).

airborne) diseases to which they are directed. The great scourge of the late 20th century in the United States and elsewhere has of course been AIDS, for which quarantine is overkill, since the disease is infectious but not contagious.[79] In addition, once the existence of the disease is established, we can expect some natural private responses to slow its spread: individuals will become more selective in their choice of sexual partners, for example, and be more willing to take vaccines (if such are available) when the perceived risks are high.[80] It hardly follows, however, that all coercive public health measures are inappropriate becomes some private responses are available. The sexual transmission of AIDS depends on the frequency of sexual contacts with multiple partners. Transmission of disease is more likely in its latent stage, before either the carrier or his sexual partner is aware of the condition. In these circumstances, potential victims cannot take defensive measures, while infected persons could take extensive measures to disguise their condition. In this environment, which accurately describes the world of the early 1980s,[81] any systemic program that slows down that rate of sexual contact will slow down the spread of the disease, especially in the early years when the virus is at maximum potency.

Yet against this backdrop we see a continued effort to downplay the compulsory use of police power regulation to deal with the AIDS menace in the name of associational freedom. I can recall attending more than one workshop where the dominant theme was that AIDS was a medical and not a social problem, as if the disease could have ever gained a toehold if everyone were

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[79] Quarantines are still used today in various settings. See, e.g. Melanie L McCall Comment: AIDS Quarantine Law in the International Community: Health and Safety Measures or Human Rights Violations?, 15 Loyola-Los Angeles Int'l. & Comp. L. J. 1001 (1993). And for tuberculosis, see Rosemary G. Reilly, Combating the Tuberculosis Epidemic: The Legality of Coercive Treatment Measures, 27 Colum J. L. & Soc. Probls. 101 (1993)

[80] For discussion of these measures, See, Thomas Philipson, Economic Epidemiology and Infectious Diseases, Handbook of Health Economics, Volume 1, 1761– (A.J. Culyer & J.P. Newhouse, eds. 2000).

perfectly monogamous. The hard question is what forms of public intervention make sense when liberty interests are so clearly implicated.

Start with the bathhouses, where so much of AIDS spread in the initial stages. The traditional police power trinity of safety, health and morals could easily justify shutting down these (sinful) operations even without specific proof that they facilitate the transmission of a particular disease. But the modern view on this subject so magnifies the constitutional rights of intimate association,[82] that the public health measures can only be justified by clear showing of disease transmission— by which time it may well be too late.[83] The better approach, it appears, is to recognize that the frequent sexual contacts with multiple partners are always risky, no matter what the state of medical technology and disease awareness. Thus with AIDS it bears noting that one critical boost for this viral epidemic was the effective control via antibiotics of the various bacterial infections (e.g. syphilis) that might otherwise kill their hosts before the viral infections had a chance to spread more widely. It is well known that the use of antibiotics always has the unfortunate collateral consequence of hastening the mutation of a pathogen into more resistant forms. But it is equally true that the effective containment of one type of (bacterial) pathogen opens the door for second type of (viral) pathogen that is wholly impervious to the full range of current medical treatments. It is harsh, counterproductive and unwise to go after individual sexual practices, but the nineteenth century practice of targeting institutions that facilitate harmful interactions with adverse third-party health

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81 For the career of the notorious Gaetan Dugas, see Randy Shilts, As the Band Played On (198).

82 See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy in marriage); Eisenstadt v. Baird, 405 U.S. 438 (1972)(privacy in intimate relationships).

83 Bowers v. Hardwick, 478 U.S. 186 (1986) deserves brief comment. By a five to four majority it rejected the view that the right of privacy contains a right of intimate association that insulates all actions of sodomy from criminal charges. The decision came over the passionate dissent of four justices, who lined up squarely behind that claim. See, e.g., Kenneth Karst, The Freedom of

effects does mark out a sensible compromise between our concern with individual liberties and the control of infectious diseases.

A second feature of the new response to AIDS also bears note: the invocation of powerful antidiscrimination norms for the benefit of individuals infected with AIDS, as regards employment, health insurance and the like. I know of no important nineteenth century regulation that ever imposed a duty to transact with others outside the common carrier settings. Even in that context the carrier was allowed as of right to exclude high-risk (e.g. unruly) customers who cost more to service than the norm. The system of rate regulation was designed to curb monopoly profits; it was not designed to introduce economic cross-subsidies between different classes of users. The modern use of the antidiscrimination principle has the commendable effect of offering assistance to people down on their luck. But it also has the regrettable dynamic effect of increasing the likelihood (by lowering the cost) that individuals will engage in these risky forms of conduct in the first place. In this regard, the inability of private individuals and firms not to deal with persons carrying compromises the long-term health of everyone else, both by increasing the expected prevalence of the disease and reducing their resources to counter it. When we put together the two sides of the equation, we see that direct regulation of health risks has been weakened, while the increased regulation of market transactions has been strengthened. Both these tendencies undermine public health in the broader sense of that term, even if these shortcomings in institutional design are masked in part by improvements in science and technology.

Finally, it is worth mentioning, if only briefly, that the new set of safety and health issues often relate to exposes to adverse conditions inside the firm, which are now regulated under OSHA, the Occupational Safety and Health Act.

Intimate Association, 89 Yale L.J. 624 (1980). The dissenters have won the war since 1986.

In my view, the first response should be that these risks are also governed by contract, and thus do not require government intervention. Historically, that position was not adopted in the nineteenth century which routinely sustained legislation that overrode contracts on safety or health grounds.[84] So much was the undisputed premise of Lochner itself. But OSHA carries safety and health regulation within the firm to a degree unheard of in an earlier, owing to the increased power of surveillance that marks the modern age. But here again there are no free lunches. Constant regulation, often on a "worst case" basis, frequently does little to protect against the accidents and diseases that do matter, but much to divert resources that could be better spent elsewhere.[85] Just as with dairy products, ill-advised extensions of regulatory power are not simply financial issues. They also have a powerful, if negative, effect on health and safety.

The current responses to the traditional health perils, therefore, have been weakened. At the same time, it seems to this outsider as though the entire public health establishment is united around the proposition that massive public action should be taken to deal with the new "epidemics," such as obesity and diabetes.[86] Here the indisputable evidence shows that more people, both adult and infants, are overweight than before and that changes in diet and increases in exercise could go a long way to prevent obesity from undermining individual problem. But the use of the term "epidemic" is just the wrong way to think about this issue. There are no noncommunicable epidemics. I am not at greater risk for obesity because an increasing fraction of my neighbors are obese. Indeed an awareness of their perilous situation may spur me onto greater care in the

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Prosecutions for sodomy will not take place no matter what the constitution requires.

84 See, e.g., New York Central R.R. v. White, 243 U.S. 188 (1916).

85 For an early account of the dangers of regulation under the worst case principle, see Richard Zeckhauser, Regulation 1986.

86 See, e.g., Thomas A. Wadden, Gardy D. Foster, Kelly D. Brownell, Obesity: Responding to the Global Epidemic, 70 J. Consulting and Clinical Psychology 510 (2002) (noting the positive association between obesity and diabetes).

conduct of my own life. The alarms over obesity make good sense if the message is that individuals have to worry about their personal health before they get sick, and should not think that medical care is a panacea that will bail them out no matter how they conduct their personal lives.

Yet the designation obesity as a public health epidemic is designed to signal that state coercion is appropriate, and it is just that connection that is missing here. Education and persuasion yes; but these can be supplied by private institutions and foundations, without government coercion, and even without government guidance and warnings, over what personal health targets should be and how they are best achieved. We need not face the specter that official tables of ideal weights ignore obvious differences in body type, age, and particular medical conditions. Indeed, here as elsewhere, there is good reason to fear that the increased levels of guaranteed health care works to undermine overall health levels. As with AIDS, the knowledge that one is protected against the adverse consequences of his own decisions by unwaivable insurance will increase to some uncertain extent the risks that individuals are prepared to tolerate.

Indeed today the major argument for extensive regulation of individual health practices comes from the government's role as the insurer of (first and) last resort, not from the fear of communicable diseases. Private insurers of course impose such conditions and can, ideally at least, back their preferences by canceling the coverage already provided. Yet the government here has made the coverage irrevocable, but has no willingness to impose explicit conditions that exclude people for dangerous habits (e.g. skydiving) or charge them differential rates for smoking or obesity. The language of epidemic suggest the need for a vigorous response akin to that of quarantine. What is probably needed is a weakening of the public safety net that induces harmful individual behaviors in the first event.

In principle, this attention to personal health prior to medical treatment, which is the hallmark of the new public health, is not provide a case for government intervention, but only for personal diligence on these matters. The issue only becomes one of public concern, paradoxically, once the decision is made to supply publicly funded health care to take care of the conditions in question. The most dominant characteristic of major public health initiatives, such as Medicare and Medicaid, is that they make no effort to tailor premiums to perceived risks: smokers under Medicare do not have to pay a stated premium, as is often required by private insurers that retain the power to exclude individuals from coverage. The upshot of all this is that the risk of cross-subsidy introduced by the flat premium structure does supply the state with some financial justification to limit personal choices. Yet the daunting administrative task of deciding what restrictions to impose, and how to enforce them, has left all such efforts stillborn. The current system is one of unconditional government cross-subsidy. The safety net granted ex post looks only at one side of the problem: the response to illness once it occurs. But it ignores the second side of the problem: the increased frequency of adverse conditions. It is worth noting that life-expectancy increased more rapidly in the first half of the past century than the second. It is quite likely that these increases resulted from some combination of public health measures and improved medical treatment. But better roads and cars, safer workplaces, better and cheaper food also count in the overall figures. When all these are taken into account, my own deep suspicion is that the new public health is likely to reduce overall life expectancy.

Vaccination. The changes of the modern approach are also revealed with the full range of issues that surround vaccination programs. The major controversy over vaccinations in the pre-1937 period concerned their compulsory application. Typically, however, the theoretical issue was overshadowed the

simple fact that most people clamored for vaccines to spare themselves from horrible illnesses or death. The twentieth century eradicated small pox and has effectively contained the full range of communicable diseases—diphtheria, typhoid, yellow fever, and malaria, to name only a few—that were the scourges of the nineteenth century. The decline of the bacterial infections has ironically led to the rise of viral infections, of which AIDS is of course the most notable. Although small pox is the notable exception, the ability of any vaccination program to eradicate communicable diseases is, however, remote: the lower the perceived prevalence of the disease, the more likely it is that people will avoid the vaccine, which then gives the disease the opening to surge through the population, at which point vaccination rates increase—until the cycle repeats itself.[87]

In some cases the problem is still greater because of the genuine difficulty in figuring out when an epidemic might well occur. The difficulty is illustrated by the Swine Flu fiasco of the mid-1970s.[88] Haunted by the specter of the 1918 pandemic that killed over 20 million people, public health officials used spotty evidence to rush into an ill-conceived mass vaccination program for a swine flu outbreak that never occurred. The program was not compulsory, but then President Ford did what he could to promote the vaccine use, including being vaccinated with his family on national television. Vaccines, alas, are not foolproof. The swine flu vaccine led to a short-term increase in deaths followed by the widespread occurrence of the Guillian-Barré Syndrome, whose progressive paralysis results in death in five percent of the cases.

During the nineteenth century, no crash program of this magnitude could have been mounted at all. The legacy of the twentieth century's improved

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87 For a more detailed account, see Philipson, supra at 1768–73.

88 For a detailed narrative, see Gina Kolata, Flu: The Story of the Great Influence Pandemic of 1918 and the Search for the Virus That Caused It 121–85 (1999).

infrastructure was a mass of liability suits based on the inadequate warnings supplied by the government as part of its program.[89] The drug companies were well aware of the risk of these suits, and they agreed to manufacture the vaccine on a crash basis only after the government took for itself all the risks associated with inadequate warnings.[90] The set of warnings for a large population that contains pregnant women, diabetics, heart disease, senior citizens, and so on is not easy to craft to meet the strict standards of modern products liability law. Those used were so woeful that the United States in litigation never defended their adequacy, but only resisted liability on such issues as causation and damages.[91] In public health, the perils of moving too rapidly are as great as those of moving to slowly.

Vaccines, of course, are not only used in response to uncertain crises. Many vaccines, such as polio vaccines or DPT are clearly indicated in many circumstances, and in these cases the expansion of tort liability post-1968 has had negative public health implications. Before 1937, no doubt many vaccinations caused adverse side-effects, but I am aware of no case that sought recovery for the adverse consequences either from the physician or other party who administered the vaccine or from the firm that manufactured it. Two explanations account for the result. First, paradoxically, it is difficult to persuade any jury that human error is responsible for adverse consequences so long as technology is primitive. In order to hold some responsible for misconduct, a jury has to have conviction that it knows what proper conduct is, and how it would have made a difference in the case at hand. As Mark Grady has argued, only

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89 See, Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (liability for Sabin vaccine); Reyes v. Wyeth Laboratories, Inc. 498 F.2d 1264 (5th Cir. 1974) (same).

90 See, National Swine Flu Immunization Program of 1976, Pub. Law 94–380, 42 U.S.C. 247b. The statute in essence made the government the sole defendant in any direct product liability action, with remedies over against the drug suppliers only for breach of contract.

91 See, e.g., Overton v. United States, 619 F.2d 1299 (8th Cir. 1980); Unthank v. United States, 732 F.2d 1517 (10th Cir. 1984)..

when death in surgery or from vaccines cease to be commonplace does liability increase.[92] In addition, when laissez-faire principles had some influence on judicial behavior, it was easy to conclude that any vaccinated person had assumed the risk of vaccine injury.

Vaccination risks are, of course, not assumed wily-nilly by rational agents. But in many settings the overarching deal made perfectly good sense. If there were a one-in-ten chance of perishing from the disease, and a one-in-one thousand chance of suffering illness or even death from the vaccine itself, then by all means trade in a larger risk for a smaller one, even if you do not receive a dime in compensation for any harms that do occur.

Before the modern period, the sentiment helped shape the substantive law. As regards physicians, the usual rule of liability required proof of negligence (which in the nineteenth century was closer to gross negligence) to establish liability. In an age in which protocols for safe delivery of vaccines are hard to establish, this case simply cannot be made out. Suits against the manufacturer on the other hand were caught by the doctrine of privity, under which "remote" suppliers of goods could not be sued by parties injury from them unless they had known of the imminent danger of the product that they made.[93] The issue of vaccine safety was left to some mix between market forces and government regulation.

The legal situation had changed dramatically by the time the swine flu vaccine was prepared.[94] Matters of causation were, in principle, at least better understood, and the rise of the modern social welfare state had undermined the intellectual and emotional appeal of assumption of risk, both in popular thought

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92 Mark Grady, Why are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion, 82 Nw. L.. Rev. 293 (1988).

93 See for the classical exposition, Huset v. J.I. Case, 120 F. 865 (8th Cir. 1903).

94 For a discussion of the evolution, see Richard A. Epstein, Modern Products Liability Law (1980).

and legal doctrine. In the previous several years, the courts had extended modern product liability theories to allow injured persons to bring suits direct against the vaccine manufacturer for its failure to warn of the dangerous side effects of the drug. The most obvious objection to many of these cases was that the vaccine did not cause the adverse reaction at all. In all likelihood the injured person had contracted the disease from nature before the vaccine had been administered. No matter. It was all a jury question, with this catch-22 scenario. The jury had to decide both the warning and the causation issues. If the vaccine did not cause the injury, then a manufacturer would have no duty to warn against side-effects that did not ensue. But once a jury was allowed, against the odds, to conclude that the vaccine did cause the injury, then by all means it was necessary to warn of these side effects. The false perception of the underlying medical situation reshaped the associated legal duties.

The results of this misattribution of harm has led to sharp increases in the price of vaccines, and a concomitant reduction in the availability.[95] Let a vaccine reduce the incidence of death from 1,000 to 50 cases, and the manufacturer does not get credit for the 950 lives saved, but is charged a hefty sum for the 50 deaths that ensued. Building the cost of insurance for those losses back into the cost of the vaccine results in higher prices and shortages, as the legal system reacts as though the vaccine supplied had caused 50 deaths and saved no lives.[96] The only sensible way to respond to these risks is to allow for the vaccines to be administered with some protection against open-ended tort liability.[97] That could be done under in two ways.

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[95] See Richard Manning, Changing Rules of Tort Law and the Market for Childhood Vaccines, 37 J. Law & Econ. 247, 248 (1994) (price of DPT vaccine increased by over 2,000 percent, 96 percent of which goes to litigation costs).

[96] For some of the calculations of net benefit, see Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277 (1985).

[97] See, e.g., Paul Rubin, Tort Reform by Contract 62–63 (1993) Second edition.

First, the manufacturers could receive statutory protection against law suits, which on public health grounds trump any common law cause of action. That protection against liability could be paired with payment of some limited sum of money from a compensation fund for those individuals who are injured by the vaccine (assuming again that the causation issues can be resolved). But that outcome has never quite been reached. The closest response to the vast increase was the National Childhood Vaccine Act of 1986[98] which developed a complex no-fault system of compensation, capped at $250,000, for persons injured through vaccines: individuals with certain specific symptoms within state time limits were entitled to sue. But the recovery under the Act is only elective, such that anyone who chooses to spurn recovery can sue for ordinary tort damages. On balance the number of cases that will be resolved under the program probably has reduced the overall level of exposure. But the dangers still remain: weak cases on liability will be funneled into the no-fault system, while the stronger cases under the tort law will remain outside of it. The response is halting and incomplete, at best.

Second, in the absence of statute, the vaccine recipients could be asked to waive their right of actions in order to receive the vaccine. That contractual waiver could be total, or, again, could be paired with some limited compensation for vaccine-induced harms. But the categorical rejection of both assumption of risk and freedom of contract has become an unchallenged article of faith in modern product liability litigation.[99] The now canonical view reads as follows: "Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid product liability claims against

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[98] citation

[99] See, Henningsen v. Bloomfield Motors, 161 A.2d 69 (N.J. 1960)(rejecting standard product warranties).

sellers or other distributors of new products for harm to persons."[100] Why? "It is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover." Markets never work because they always fail.

At this point we have come full circle. In my view, the restriction of (nineteenth century) principles of freedom of contract has strong adverse effects on overall health, by reducing the development and supply of needed vaccines and other pharmaceuticals that will be brought to market. Yet the standard public health treatises that expound the new public health undertake no discussion of the implicit trade-offs raised by this problem. Professor Gostin has a cursory summary of the evolution of strict liability of tort in product liability cases, but no examination of the specific liability issues that have arisen with respect to vaccines. The New Public Health treatise of Tulchinsky and Varavikova does not broach the question of tort liability and its relationship to freedom of contract at all. But the lesson still remains. The economic principles of scarcity have as their legal offshoot the principle of correlative rights and duties. No new rights can be created unless new duties are imposed. The issue is whether the imposition of tort liability, and the corresponding contraction of freedom of contract make sense in light of the dominant tendencies that they produce. Measured in lives saved, they do not.

Public Morals. The discussion of the modern view of public morals is implicit in what has already been said. The older view that unregulated sexual conduct was a public health risk that justified public coercion has been effectively silenced in modern discourse. Today the emphasis is heavily on voluntary compliance with various norms in the effort to reduce the spread of disease, such that various institutional responses to communicable diseases have

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[100] Restatement (Third) of Products Liability. § 18.

been weakened when they are most needed: before the identification to the threat makes private responses sensible. The trade-offs here are no different from those associated with the modern concerns on the trade-off between liberty and security in a potential age of (bio)terrorism. Both liberty and regulation should be understood as principles designed to achieve overall human satisfaction. The glorification of liberty, even for a libertarian, is risky business when the specter of infectious diseases looms so large on the horizons. We should not forget the concerns of the old public health in the headlong rush to embrace the new.

VI. CONCLUSION

In one sense the debate over the proper collective response to public health offers but one arena in which to test the relative power of the classical liberal as opposed to the modern social welfare model of the state. Here too I think that the classical model outperforms its rivals. By stressing the importance of private wealth creation through private property and voluntary exchange, it gives individuals the resources that allow them to take effective individual measures to insure and promote their own health. By offering focused intervention on matters of communicable disease, it seeks to control externalities that private forces cannot resist. The two efforts are not unrelated. The increase in private wealth will result in a higher level of taxation to create the social infrastructure and environmental control systems needed to contain these public health risks in the first place.[101] Stated otherwise, these issues have to be examined from a comprehensive perspectives that understands the profound interactions between public health and private wealth creation. The old public health by choosing more focused targets for government intervention, showed a greater appreciation for these complex systematic effects.

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[101] "Once per capita incomes get to abouty $8,000 per year, nations start aggressively improving their environments." James K. Glassman, A Bright Idea in Development WSJ at A12, 9/6/02.

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